with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621 (1981).

In this case, the Court of Appeals' choice-of-law decision raises and finally decides the federal FFC issue "for purposes of state-court proceedings." There are no other federal issues to be determined on remand; as Respondent acknowledges, the only issues on remand are matters of *state* law. (BIO at 15) ("Were the public policy ground barred, Mrs. Davis could still proceed with her claim for statutory rights and the invalidity of the waiver based on the theory of duress"). In such circumstances, finality exists because there is no risk of piecemeal review of the *federal* issues. *Accord*, *Cox*, 420 U.S. at 477 (finality exists when the "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date" because "wholly unrelated to the federal question"); *WOW*, 326 U.S. at 127 (a "presupposition" of finality in such circumstances is that the remaining issues will not "give rise to a federal question"). *See also Snyder's Drug*, 414 U.S. at 162-63 (finality exists even though "[t]here were state law questions to be considered on the remand, for the state board had also rested its denial of a permit on the failure of Snyder's to meet certain structural and safety standards. The [North Dakota] Supreme Court remanded for an administrative hearing on those other issues").

Respondent further asserts that finality does not exist because Petitioners "have other grounds on which they could prevail." (BIO at 14) Contrary to Respondent's assertion, the possibility that Petitioners herein may prevail on nonfederal grounds does not deprive the Court of Appeals' decision of finality: "That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue [in this Court] is not preclusive of our jurisdiction." *Cox*, 420 U.S. at 486 n.13.

CONCLUSION

In sum, certiorari should be granted. There is no jurisdictional barrier to this Court's hearing Petitioner's important FFC claim. In the circumstances of this case, none of the reasons cited by Respondent – (a) the existence of related but separable litigation in Florida; (b) the possibility that Respondent might prevail on her state-law duress claim; or (c) the possibility that Petitioners might prevail on state-law grounds on remand – deprive this Court of jurisdiction. Indeed, to the contrary, there are overriding reasons for this Court to hear this matter at this timely time, when intervention can (i) forestall wasteful, duplicative expense; (ii) pretermit the need for existing litigation in Florida; and (iii) provide review and guidance on an important matter of federalism under FFC.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

DOROTHY L. DAVIS, Petitioner/Appellant, J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS, Respondents/Appellees.	)	No. M2003-02614-COA-R3-CV Appeal as of right from the Seventh Circuit Court (Probate Division), Davidson County No. 02P-0859

BRIEF OF APPELLEES, J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS

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ORAL ARGUMENT REQUESTED

* * *

A. Both the U.S. Constitution and the Tennessee Constitution require Tennessee to give full faith and credit to every other state's acts, records, and judicial proceedings.

The United States Constitution requires each state to give full faith and credit to every other state's public acts, records, and judicial proceedings. U.S. Const. art. IV, Section 1 provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

The Tennessee Constitution contains a virtually identical provision at Article IV, Section 1, which provides as follows:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Tenn. Const. art. IV, § I.

B. Tennessee must afford full faith and credit to the laws of Florida unless no doubt exists that doing so would clearly prejudice the public interest of the citizens of the State of Tennessee.

"[W]here the law of another jurisdiction is applicable, Tennessee will enforce the substantive rights which litigants have under the laws of the other jurisdiction if such rights are not contrary to the policy of Tennessee." *Hyde v. Hyde*, 562 S.W.2d 194, 196 (Tenn. 1978). *See also Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998) (quoting *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991) and holding that "[u]nless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy.").

Tennessee courts have defined public policy as "the present concept of public welfare or general good." *Smith v. Gore*, 728 S.W.2d 738, 746-747 (Tenn. 1987).

The mere fact that the law of a sister state differs from the law of Tennessee does not render that state's law contrary to Tennessee public policy. *Brown v. Hogan*, 14 Tenn. App. 251, 254 (1931) (quoting *Whitlow v. N.C. & St. L. Ry. Co.*, 84 S.W. 618, 621 (Tenn. 1904)). *See also Parsons v. American Trust & Banking Co.*, 73 S.W.2d 698, 700 (Tenn. 1934) (holding that public policy did not forbid the enforcement of a Florida cause of action not available in Tennessee and quoting Justice Cardozo's observation in *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. Ct. App. 1918) that "If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to

him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.); *Francis v. Francis,* 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996) (holding that the fact that Tennessee had abolished the tort of alienation of affections was not a basis for refusing to afford full faith and credit to a North Carolina judgment based upon that tort); *Four Seasons Gardening & Landscaping, Inc. v. Crouch,* 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984) (holding that, "the judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law.").

Before declaring a contract void on public policy grounds, a court must determine that no doubt exists that enforcing the contract would clearly prejudice the public interest. *Stansell v. Roach,* 246 S.W. 520, 522 (Tenn. 1923).

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate ***some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.***

Robinson Property Group, L.P. v. Russell, 2000 Westlaw 33191731, *4 (quoting Judge Cardozo in *Loucks v. Standard Oil Co.,* 120 N.E. 198 (N.Y. Ct. App. 1918)). [Emphasis added]

When determining whether a contract is void in violation of public policy, a court may properly consider the "situation of the parties at the time the contract was made

and the purposes of the contract." *Hoyt v. Hoyt,* 372 S.W.2d 300, 303 (Tenn. 1963) (holding that reconciliation

* * *

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE MIDDLE SECTION AT NASHVILLE

IN RE:
THE ESTATE OF J.D. DAVIS, DECEASED

Dorothy L. Davis,	
Plaintiff-Appellant,	**Appeal No. M2003-02614-COA-R3-CV**
v.	
J. Douglas Davis, Julie Ann Davis Griffin, Co-Executors,	**Appeal as of Right from the Seventh Circuit Court (Probate Division), Davidson County**
Defendants-Appellees.	

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

* * *

Ins. Co. v. Haney, 425 S.W.2d 590, 592 (Tenn. 1968); *National Garage Co. v. George H. McFadden & Bro., Inc.*, 542 S.W.2d 371, 374 (Tenn. Ct. App. 1975) (contract should be construed "most strictly" against the drafter); *Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996) ("Ambiguities in contract language should be construed against the party responsible for drafting the contract."). This rule of construction is especially called for here, since Mrs. Davis did not even have an opportunity to review the agreement before signing it.

IV. CONTRARY TO APPELLEES' ASSERTION, TENNESSEE COURTS ARE NOT REQUIRED TO GIVE FULL FAITH AND CREDIT TO LAWS OF ANOTHER STATE THAT ARE VIOLATIVE OF CLEARLY RECOGNIZED TENNESSEE PUBLIC POLICY.

The Defendants contend [Appellees' Br. at 13] that, as a matter of full faith and credit, a Tennessee court must give effect to the law of the state where a contract was executed. This assertion is simply incorrect. The full faith and credit clause of the United States Constitution applies principally to the enforcement by one state of a *judgment* rendered by a court of another. It provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe in the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST., art. IV, § 1. *See also* TENN. CONST., art. IV, § 1 (setting forth a similar provision).

There is no Florida judgment in this case. Therefore, the captioned argument beginning on page 13 of Appellees' Brief, which maintains that the full faith and credit clause requires application of Florida law, is incorrect. Likewise, the gambling debt cases cited on pages 20-21 of the Appellees' Brief are not relevant to this case as they involve suits to enforce existing judgments rendered in other states. This Court made this point explicitly in *Boardwalk Regency Corp. v. Patterson*, No. M11999-02805-COA-R3-CV, 2001 WL 1613892 (Dec. 18, 2001), in which this Court stated: "In the words of the Tennessee Supreme Court, reducing a gambling debt to judgment 'purifies the contract from the gaming taint.'" The same is true of *Hyde v. Hyde*, 562 S.W.2d 194 (Tenn. 1978), *Francis v. Francis*, 945 S.W.2d 752 (Tenn. Ct. App. 1989), and *Four Seasons Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439 (Tenn. Ct. App. 1984). These cases also involved enforcement of foreign judgments. As for *Brown v. Hogan*, 14 Tenn. App. 251 (1931), it actually recognized that Tennessee need not give effect to the laws of another state if "prejudicial to the general interests of its own citizens." *Parsons v. American Tr. & Banking Co.*, 73 S.W.2d 698, 700 (Tenn. 1934), also cited by the Appellees, simply found that Alabama law was not in conflict with Tennessee public policy because there was only a "single difference" in the two states' laws.

Even if Florida's law, which excuses disclosure of assets in the probate context, is deemed a public law under the full faith and credit clause, Tennessee's own statute requiring disclosure trumps it. As was stated by the United States Supreme Court in *Nevada v. Hall*, 440 U.S. 410, 421-22 (1979), "[T]he Full Faith and Credit Clause does not require a State to apply another State's

law in violation of its own legitimate public policy." *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Rosengarten v. Downes*, 802 A.2d 170, 178 (Conn. Ct. App. 2002). Indeed, the United States Supreme Court has held that a state court is constitutionally free to apply its own law rather than the law of any other state as long as it has a significant contact or aggregation of contacts with the matter. *See Phillips Petroleum v. Shutter*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

The antenuptial agreement in the present case has many significant contacts with the Tennessee forum. The decedent was a domiciliary of Tennessee when he signed the agreement and remained one throughout his life until his death. The parties routinely spent six months each year in Tennessee. They maintained a Tennessee residence from the time of their marriage until the decedent's death. During their marriage, the decedent identified himself as a citizen of Tennessee on official documents. Most of the assets regarding which Mrs. Davis now makes her claim as a surviving spouse were situated in Tennessee and still are situated here. In light of these very significant contacts, Tennessee is constitutionally free to apply its own law in pursuit of its public policy rather than that of Florida.

What then is Tennessee's public policy? The Defendants would have this Court believe that it is to favor antenuptial agreements, *no matter how procured*. The Defendants explain that Tennessee courts have recognized that antenuptial agreements foster the marital relationship by eliminating the tendentious issue of marital property rights. [Appellees' Br. at 15-16] Actually, Tennessee's public policy toward antenuptial agreements is

considerably more sophisticated than the Defendants' characterization. As the Tennessee Supreme Court in *Randolph v. Randolph*, 937 S.W.2d at 821, made clear, antenuptial agreements implicate special public policy concerns, because "the State has an interest in and is party to every marriage." Moreover, antenuptial agreements are not like other contracts. They involve confidential relationships, are not formed as a result of

* * *

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE

DOROTHY L. DAVIS, Petitioner/Appellee, J. DOUGLAS DAVIS AND JULIE ANN DAVIS GRIFFIN, CO-EXECUTORS, Respondents/Appellants.	Supreme Court Case No. ___ ON APPEAL FROM THE TENNESSEE COURT OF APPEALS, MIDDLE SECTION AT NASHVILLE

APPLICATION FOR PERMISSION TO APPEAL

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IF APPEAL IS GRANTED, ORAL ARGUMENT ON THE MERITS IS REQUESTED.

* * *

VII. ARGUMENT IN SUPPORT OF THE ESTATE'S APPLICATION FOR PERMISSION TO APPEAL

Rule 11(a) of the Tennessee Rules of Appellate Procedure lists "the character of reasons" that this Court will consider when determining whether to grant permission to appeal. These reasons, which neither control nor limit the

court's discretion, include (1) the need to secure uniformity of decision; (2) the need to secure settlement of important issues of law; (3) the need to secure settlement of important questions of public interest; and, (4) the need for the exercise of the Supreme Court's supervisory authority. Tenn. R. App. Proc. 11(a).

The Estate's Application for Permission to Appeal should be granted because each of the four "character of reasons" is present in this case.

A. THE DECISION OF THE COURT OF APPEALS IS UNCONSTITUTIONAL. THE COURT OF APPEALS ERRED IN HOLDING THAT AN ANTENUPTIAL AGREEMENT EXECUTED BY A FLORIDA DOMICILIARY WITH HER HUSBAND, A RESIDENT OF BOTH TENNESSEE AND FLORIDA, WHILE BOTH WERE IN FLORIDA, AND VALID UNDER FLORIDA LAW IS UNENFORCEABLE BECAUSE IT IS CONTRARY TO THE PUBLIC POLICY OF TENNESSEE. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE FULL FAITH AND CREDIT CLAUSES OF BOTH THE U.S. AND TENNESSEE CONSTITUTIONS.

Although the Court of Appeals never mentioned in its decision the constitutional provisions in the U.S. and Tennessee constitutions which require Tennessee to afford full faith and credit to the acts, records, and judicial proceedings of sister states, that is where this Court's analysis should start.

1. Both the U.S. and Tennessee constitutions require Tennessee to give full faith and credit to every other state's acts, records, and judicial proceedings.

Article IV, Section 1, of the U.S. Constitution provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Tennessee Constitution contains a virtually identical provision at Article IV, Section 1.

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

According to the United States Supreme Court, the purpose of the full faith and credit clause is to

> [A]lter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77, 56 S.Ct. 229, 234, (1935).

2. A state may refuse to afford full faith and credit to a sister state's acts, records, and judicial proceedings only in the rare case where doing so will offend fundamental policies of the forum state.

a. The public policy exception to the full faith mandate recognizes that, in rare circumstances, the forum state may refuse to afford full faith and credit to the acts, records, and judicial proceedings of a sister state.

Although the full faith and credit clause itself does not contain any exceptions to its mandate, "the command of the Constitution . . . is not all-embracing." *Id.* at 273-74, 232. "[C]onsistent[] with the full-faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another." *Id.* at 273, 232. On the other hand, it has long been recognized that states sometimes must sacrifice their local public policies in order to uphold the unifying principle of the full faith and credit clause. *Sherrer v. Sherrer,* 334 U.S. 343, 355, 68 S.Ct. 1087, 1092-93 (1948).

> The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such 'is part of the price of our federal system.'
>
> * * *
>
> This is not to say that in no case may an area be recognized in which reasonable accommodations

> of interest may properly be made. But as this Court has heretofore made clear, that area is of limited extent. . . . We believe that assurances that such a power will be exercised sparingly and wisely render it no less repugnant to the constitutional commands.

Id. (citing *Williams v. North Carolina,* 317 U.S. 287, 302, 63 S.Ct. 2017, 215 (1942)).

This public policy exception to the full faith and credit clause is to be narrowly construed and applied only when fundamental policies of the forum state are offended. Judge Cardozo penned the classic formulation of when a court may refuse to enforce the laws of a sister state.

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate ***some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal***.

Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. Ct. App. 1918). (emphasis added)

Mr. Justice William Fones characterized the public policy exception as follows:

> [W]here the law of another jurisdiction is applicable, Tennessee will enforce the substantive rights which litigants have under the laws of the other jurisdiction if such rights are not contrary to the policy of Tennessee.

Hyde v. Hyde, 562 S.W.2d 194, 196 (Tenn. 1978).

b. Tennessee may refuse, on public policy grounds, to enforce a private contract otherwise valid under the laws of a sister state only where enforcement would tend to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee.

Tennessee courts may not refuse enforcement of contracts on public policy grounds unless no doubt exists that enforcing the contract would clearly prejudice the public interest. *Stansell v. Roach,* 246 S.W. 520, 522 (Tenn. 1923). *See also Alcazar v. Hayes,* 982 S.W.2d 845, 851 (Tenn. 1998) (quoting *Spiegel v. Thomas, Mann & Smith, P.C.,* 811 S.W.2d 528, 530 (Tenn. 1991) and holding that "[u]nless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy.").

The mere fact that the law of a sister state differs from the law of Tennessee does not render that state's law contrary to Tennessee public policy. *Brown v. Hogan,* 14 Tenn. App. 251, 254 (1931) (quoting *Whitlow v. N. C. & St. L. Ry. Co.,* 84 S.W. 618, 621 (Tenn. 1904)). *See also Parsons v. American Trust & Banking Co.,* 73 S.W.2d 698, 701 (Tenn. 1934) (holding that public policy did not forbid the enforcement of a Florida cause of action – suit for wrongful death commenced after the death of the wrongdoer – which was not available in Tennessee. The *Parsons* opinion quotes Justice Cardozo's observation in *Loucks v. Standard Oil Co.,* 120 N.E. 198, 201 (N.Y. Ct. App. 1918) that "If a foreign statute gives the right, the mere fact that

we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."); *Francis v. Francis,* 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996) (holding that the fact that Tennessee had abolished the tort of alienation of affections was not a basis for refusing to afford full faith and credit to a North Carolina judgment based upon that tort); *Four Seasons Gardening & Landscaping, Inc. v. Crouch,* 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984) (applying the law of Georgia to a contract between a Georgia corporation and a Tennessee resident and enforcing a Georgia default judgment against the Tennessee resident despite the fact that the remedies awarded in Georgia differed from those available in Tennessee. The Court noted that, "the judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law.").

3. U.S. and Tennessee Supreme Court cases require a court to engage in a two-part process when determining whether it is constitutionally permissible to apply the public policy exception to the full faith and credit clause.

In *Smith v. Gore,* this Court held that a court must engage in a two-part process when determining whether to refuse to enforce a contract on public policy grounds. First, the court must decide "whether or not any controlling public policy has been established or declared." *Smith v. Gore,* 728 S.W.2d 738, 746 (Tenn. 1987). Second, the Court must determine how that policy applies to the facts of the

particular ease. *Id. See also Alaska Packers Assn v. Industrial Accident Commission of California,* 294 U.S. 532, 544-49, 55 S.Ct. 518, 522-25 (1935) (identifying relevant public policies and then weighing competing policies to hold that an injured employee could recover workers compensation benefits in California, where the contract for employment was formed, as opposed to being required to seek a remedy under the laws of Alaska where the injury occurred.)

a. The court must first identify all relevant public policies.

The court's first step in determining whether a private contract harms the public good, public interest, or public welfare, or conflicts with the constitution, laws, or judicial decisions of Tennessee, is to correctly identify any and all relevant public policies.

> The law in Tennessee restricts this Court's role in declaring public policy. The Court is not free to establish what its members believe to be the best policy for the State; rather, we must determine where public policy is to be found, what the specific public policy is, and how it is applicable to the case at hand. Ordinarily, the Court is not the institution that is called upon to divine the nature of public policy in its most general terms; this Court usually decides whether or not any controlling public policy has been established or declared and then determines how it applies to a particular case.

Smith v. Gore, 728 S.W.2d at 746.

As this Court recognized in *Home Beneficial Ass'n v. White,* "'the meaning of the phrase 'public policy is vague and variable; courts have not defined it, and there is no fixed rule to determine what contracts are repugnant to it.'" *Home Beneficial Ass'n v. White,* 177 S.W.2d 545, 546 (Tenn. 1994). (citations omitted)

Generally, the public policy of Tennessee "is to be found in its constitution, statutes, judicial decisions and applicable rules of common law." *Id.* at 588-89. However, as this Court noted in the case of *Pennegar and Haney v. State,* not every case or every provision of a statute is indicative of a state policy. *Pennegar and Haney v. State,* 10 S.W. 305, 306 (Tenn. 1888). That case, which addressed the issue of whether a common-law marriage contracted in Alabama specifically for the purpose of avoiding a Tennessee criminal statute prohibiting a spouse divorced for adultery from marrying the adulterous partner during the lifetime of his or her former spouse, required the Court to consider and reconcile various public policies. Noting that, "[i]t is not always easy to determine what is a positive State policy," the Court recognized that not every relevant case or statute is an embodiment of state policy.

> It will not do to say that every provision of a statute prohibiting marriage under circumstances, or between certain parties, is indicative of a State policy in the sense in which it is used in this connection.

Id.

b. The Court next must balance the relevant policies against the full faith mandate and can refuse to enforce an otherwise valid contract only where no doubt exists that doing so would clearly prejudice the public in some specific manner.

The court's second step in deciding whether enforcement of a contract will violate the state's public policy is to determine how the relevant policies apply to the facts of the particular case. *Smith v. Gore,* 728 S.W.2d at 746. This step requires the court to carefully balance the public policies at issue against the mandates of full faith.

In *Alcazar v. Hayes,* the Court performed this two-step analysis in a case where it was asked to determine whether an insured who failed to comply with the notice provision of her insurance policy could nevertheless enforce the policy so long as the insurer had not been prejudiced by the delay. *Alcazar v. Hayes,* 982 S.W.2d at 856. The Court first recited that

> For years Tennessee has consistently adhered to the traditional common law approach that: (1) notice is a condition precedent to recovery under the policy and (2) there need not be any showing of prejudice

Id. at 849. The Court then went on to identify the other relevant public policies, including minimization of litigation, the interest of insurers in protecting their interests by being able to promptly investigate claims and prepare a defense, the compensation of tort victims, and the construction of insurance contracts in favor of the insured. *Id.* at 850-54. Once it had identified the relevant polices, the Court turned to the second part of the *Smith v. Gore*

analysis and carefully weighed the competing public policies. The Court found that certain of these policies combined to justify abandoning the traditional approach to this issue and, as a result, the Court adopted the modern rule that an insured did not forfeit his or her rights under an uninsured motorist policy due to a delay in complying with the policy's notice provision unless the insurer had been prejudiced by the delay in notice. *Id.* at 856.

This Court also performed the two-step analysis in *Hyde v. Hyde,* which is similar to the present case. In *Hyde*, this Court was asked to decide whether a divorce decree entered by a Dominican Republic court for parties who were domiciled in Memphis, Tennessee, was valid. *Hyde v. Hyde,* 562 S.W.2d at 197. When performing the first step of the analysis, the Court identified the relevant policies, namely Tennessee's policy favoring marriage; the state's decision to permit divorce on the ground of irreconcilable differences; and the more general policy against the state surrendering its sovereignty "to a foreign nation whose laws evince no interest in maintaining the stability of marriage as an institution." *Id.* at 197. The Court next turned to weighing these policies and decided that the policy permitting divorce took precedence over the state's interest in preserving its sovereignty and held that the foreign judgment was valid and enforceable in Tennessee. *Id.* at 198.

4. Because the Court of Appeals failed to identify all relevant public policies and to properly balance those policies against the full faith mandate, it refused to enforce a Florida contract in violation of the U.S. and Tennessee constitutions.

a. The Court of Appeals failed to properly identify all relevant public policies.

Rather than performing this first, basic step, the Court of Appeals incorrectly – and seemingly arbitrarily – identified what it considered to be the one relevant public policy – full disclosure. *In re Davis,* 2004 Tenn. App. LEXIS 585, at *17-18 (Tenn. Ct. App. Aug. 3, 2004).[7]

For reasons not explained in its decision, the Court ignored the numerous fundamental public policies which were critical to its analysis, policies which have long influenced the laws of this state and the decisions of its courts. These include policies favoring: (1) enforcement of contracts in general; (2) enforcement of antenuptial contracts in particular; (3) marriage; (4) marital stability; (5) contractual certainty; (6) enforcement of the wishes of testators; (7) minimization of litigation; and, (8) protection and enforcement of rights so as to avoid forfeiture. *Alcazar v. Hayes*, 982 S.W.2d at 849 (minimization of litigation); *Home Beneficial Ass'n v. White*, 177 S.W.2d at 546 (enforcement of contracts); *Wright v. Brandon*, 863 S.W.2d 400, 402 (Tenn. 1993) (enforcement of the intent of

[7] The Court of Appeals' opinion contains no mention of the fact that the Agreement, signed by Mrs. Davis, contains a provision indicating that both parties had disclosed to one another the nature and extent of their holdings. I R. 83.

testators); *Perkinson v. Perkinson*, 802 S.W.2d 600, 601 (Tenn. 1990) (antenuptial agreements); *Hoyt v. Hoyt*, 372 S.W.2d 300, 302-03 (Tenn. 1963) (marriage and marital stability); *Craft v. Forklift Sys.*, 2003 Tenn. App. LEXIS 491, at *8 (Tenn. Ct. App. May 8, 2003) (contractual certainty); *Sanders v. Sanders*, 288 S.W.2d 473, 479 (Tenn. Ct. App. 1955) (forfeitures).

In choosing to base its decision on a single policy, namely full disclosure, the Court of Appeals ignored the clear mandate of this Court that "[t]he Court is not free to establish what its members believe to be the best policy for the State." *Smith v. Gore*, 728 S.W.2d at 746.

Furthermore, full disclosure is not a policy at all; instead, it is one of the many factors to be considered in the application of this state's policy favoring the enforcement of antenuptial agreements. Full disclosure is simply one factor to be considered when determining whether an antenuptial agreement should be enforced.

Tennessee's statute governing antenuptial *agreements* makes absolutely no mention of full disclosure or independent knowledge. T.C.A. § 36-3-501 (West 2004).[8] Instead, the statute

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[8] Tenn. Code Ann. Section 36-3-501 provides as follows:

Notwithstanding any other provision of law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage which is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of

(Continued on following page)

* * *

provides that antenuptial agreements are valid when they have been entered into "freely, knowledgeably and in good faith and without exertion of duress or undue influence *upon* either spouse." *Id.* Apparently, as far as the General Assembly was concerned, full disclosure or independent knowledge were not sufficiently important enough to merit specific mention in the body of the statute, despite the fact that courts had required full disclosure or independent knowledge for decades.[9] *See, e.g., Baker v. Baker,* 142 S.W.2d 737, 746 (Tenn. 1940) (holding the burden was upon the proponents of an antenuptial agreement to show either that there was a full disclosure of the nature, extent, and value of the husband's property, or that the widow otherwise had full knowledge of her spouse's property and voluntarily entered into contract with such knowledge).

The decision of the Court of Appeals therefore should be reviewed because, instead of identifying all of the relevant public policies of this state, the Court of Appeals chose to rely solely upon a single policy and reached a

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duress or undue influence upon either spouse. The terms of such agreement shall be enforceable by all remedies available for enforcement of contract terms.

[9] In *Randolph v. Randolph,* this Court interpreted the "knowledgeably" requirement in the statute as requiring

> [E]ither that a full and fair disclosure of the nature, extent, and value of his or her holdings [be] provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse's holdings.

Randolph v. Randolph, 937 S.W.2d 815, 821 (Tenn. 1996).

decision which violates the full faith and credit clauses of both the U.S. and Tennessee constitutions.

b. Because the Court of Appeals failed to properly identify all relevant public policies, it was unable to engage in the proper balancing of these interests against the constitutional mandate requiring Tennessee to afford full faith and credit to the laws of its sister state, Florida.

The Court of Appeals declared that, because it differed from the laws of this state, the applicable section of the Florida code "violates a substantially important public policy of the State of Tennessee," and, accordingly, the Court of Appeals "decline[ed] to apply the *lex loci* rule to this agreement." *In re Estate of Davis,* 2004 Tenn. App. LEXIS 585, at *21 (Tenn. Ct. App. Aug. 3, 2004).[10]

As a result, the Court of Appeals refused to enforce a valid Florida contract in violation of the U.S. and Tennessee constitutions and well-settled law. The decision of the Court of Appeals should be reviewed – and reversed – due to its constitutional infirmities.

* * *

[10] The Court of Appeals also failed to identify any specific detriment which would undoubtedly result if the contract were enforced as required under this Court's decision in *Stansell v. Roach,* 246 S.W.2d at 522. In addition, the Court of Appeals apparently based its decision, at least in part, upon the domicile of the parties and intended place of performance of the Agreement. Neither of these issues was briefed or argued at the probate court level.

APPENDIX D

IN THE SUPREME COURT
FOR TENNESSEE AT NASHVILLE

IN RE:
THE ESTATE OF J.D. DAVIS,
DECEASED

Dorothy L. Davis,	)	
Petitioner-Appellee,	)	
v.	)	**Appeal No.**
J. Douglas Davis, Julie Ann Davis Griffin,	)	**M2003-02614-SC-R11-CV**
Co-Executors,	)	
Respondents-Appellants.	)	

ANSWER IN OPPOSITION TO
RESPONDENTS/APPELLANTS' APPLICATION
FOR PERMISSION TO APPEAL

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IF APPEAL IS GRANTED,
ORAL ARGUMENT IS REQUESTED

* * *

Bratton, 136 S.W.3d 595, 600-01 (Tenn. 2004), recognizing that, like antenuptial agreements, postnuptial agreements are valid only if entered into "knowledgeably."

A. THE DECISION OF THE COURT OF APPEALS IS CONSTITUTIONAL. ITS DECISION IS ENTIRELY HARMONIOUS WITH THE REQUIREMENTS OF THE FULL FAITH AND CREDIT CLAUSE OF THE U. S. CONSTITUTION.

Respondents/Appellants maintain that the Court of Appeals' decision is unconstitutional in that it violates the Full Faith and Credit Clauses of the United States and Tennessee Constitutions, which Respondents/Appellants contend are virtually identical.[1] In their presentation of the case law interpreting and applying the Full Faith and Credit Clause, however, the Respondents/Appellants make an important analytical error. They fail to distinguish two very different situations, (i) one in which a party has obtained a judgment in another state and seeks to enforce it in Tennessee and (ii) one in which a party has *not* obtained a foreign judgment, but is asking a Tennessee forum court to apply the law of another state even though that law conflicts with the Tennessee forum's own law and an undisputed, strong public policy of Tennessee.

In the first situation described above, a judgment of a court of a sister state generally must be given recognition

[1] Respondents/Appellants quote language which they claim is derived from Art. IV, § 1 of the Tennessee Constitution relating to Full Faith and Credit. In fact, the quoted language does not appear anywhere in the Tennessee Constitution.

and enforced. Tennessee courts are held to a "stern and heavy burden" in this regard, and nothing short of a compelling reason must be proffered for denying recognition. *See Biogen Distrib., Inc. v. Tanner*, 842 S.W.2d 253, 256 (Tenn. Ct. App. 1992). *See also In re Riggs*, 612 S.W.2d 461 (Tenn. Ct. App. 1980). The U.S. Supreme Court cases cited in Respondents/Appellants' Application, pp. 10-11, fall into this category. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935); *Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948); *Williams v. North Carolina*, 317 U.S. 287 (1942).

When a party, as in the present case, is seeking simply to have another state's law applied to a dispute before a Tennessee court, an entirely different standard applies. The issue now is one of a conflict of laws between that of the forum and that of a sister state. The U.S. Supreme Court has held repeatedly that, under the Full Faith and Credit Clause, the forum is entirely free to choose which of the two competing laws it will follow. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *AllState Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Nevada v. Hall*, 440 U.S. 410, 421-22 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.").

This very important distinction between (i) enforcement of sister state *judgments* and (ii) forum court application of sister state *laws* could not have been stated more clearly than the United States Supreme Court did in *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998):

> Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. "In numerous cases this Court has held that credit must be given to the judgment of

> another state although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee County*, 296 U.S. at 277, 56 S. Ct., at 234. The Full Faith and Credit Clause does not compel "a state to substitute the statute of other states for its own statutes dealing with subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S. Ct. 629, 632, 83 L. Ed. 940 (1939); see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19, 105 S. Ct. 2965, 2977-2978, 86 L. Ed. 2d 628 (1985).

In the present case, no *judgment* from Florida was ever obtained as to the validity of the antenuptial agreement. Thus, the requirement as to sister state "judgments" simply does not apply in this case. The Respondents/Appellants have, apparently, failed to appreciate this basic and indisputable distinction recognized in U.S. and Tennessee Constitutional law. Respondents/Appellants rely on *judgment* cases, such as *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935), and *Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948), to argue a constitutional violation by the Tennessee Court of Appeals, even though, unlike those cases, the present case only involves conflicting laws and public policies of Tennessee and the State of Florida.

The decision of the forum court as to which law to apply involves the concept of comity. Ordinarily, when no strong, local public policy is at stake, a court will apply the lex loci contractus in a contract case involving conflict of laws. However, the general approach to comity, the application of another state's law as if it were Tennessee's own, has important limits, long observed by the courts of this State. The Tennessee Supreme Court addressed the

matter head-on in *First Nat'l Bank v. Shaw*, 109 Tenn. 237, 70 S.W. 807 (1902). That case involved an attempt to enforce in Tennessee a note executed in Ohio by a married woman when coverture was still in force in Tennessee. Ohio law allowed enforcement of the note against the wife.

The Tennessee Supreme Court refused to apply Ohio law, the lex loci contractus. This Court held:

> . . . rights and contracts arising under the laws of a foreign state will not be enforced here, except under the doctrine of the comity of states, and . . . this doctrine neither requires nor sanctions the enforcement in the courts of this state of statutory rights and contracts arising under the laws of a foreign state which are repugnant to the policy and spirit of our laws.

First Nat'l Bank, 70 S.W. at 808.

Likewise, in *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S.W.2d 350 (1941), the Tennessee Court of Appeals refused to enforce a note executed in Georgia waiving right of exemptions as "head of a family." The Court relied, *inter alia*, on the Restatement of Conflict of Laws § 612 (1932), which provides: "no action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the public policy of the forum."

Subsequently, in *Martin v. Dealers Transport Co.*, 48 Tenn. App. 1, 342 S.W.2d 245 (1961), the Court of Appeals refused to enforce a labor contract entered into in Kentucky, since it violated Tennessee's "right to work" laws. The Court quoted from C.J.S., *Contracts*, § 16, at 348-49, in holding that "the instant case falls within that class or

type of cases where the *lex fori* prevails over the *lex loci contractus*:"

> An exception to the general rule that a contract valid under its governing law is valid everywhere is the rule that where the agreement * * * violates the fixed public policy of the state in which the action is brought, it will not be enforced by "public policy of the state" being meant the law of the state, whether found in the Constitution, statutes or judicial records.

48 Tenn. App. at 10-11, 342 S.W.2d at 249. *See also* AMJUR, CONFLICTS OF LAW § 26 (2d ed. Database updated May 2004) ("The public policy of a state is supreme, and, when once established, will not as a rule be relaxed even on the ground of comity to enforce contracts which, though valid where made, contravene such policy."). 17 C.J.S., *Contracts*, § 21(d), at 453 (1999 & 2004 Supp.) ("A court cannot apply the law of another jurisdiction if doing so would contravene the public policy of its own jurisdiction.").

Public policy considerations override comity even when Tennessee is neither the place of execution nor the place of performance of a contract. *See, e.g., Moak v. Continental Cas. Co.*, 4 Tenn. App. 287, 4 (1927), in which the Tennessee Court of Appeals held that:

> However, a contract may be valid by the laws of both the place where it is made and the place where it is to be performed, and yet fail because the lex fori, on the grounds of public policy, will not permit its enforcement. . . . The public policy of a State, established either by express legislative enactment, or by the decisions of its courts, is supreme, and when once established will not,

> as a rule, be relaxed even on the ground of comity to enforce contracts, which, though valid where made, contravene such policy.

Contrary to Respondents/Appellants' attempt to portray as highly unusual and rare the application of Tennessee law by a Tennessee forum when a strong public policy of the State is involved, any such portrayal is incorrect. Rather, a Tennessee court is always free to apply its own law and must, in fact, do so when its own strong public policies are at stake. Since the Full Faith and Credit Clause does not require application of another state's *law*, it makes no sense for Tennessee to ignore the strong public policy pronounced by its own legislature and Supreme Court and defer instead to the sharply conflicting policies of another state's (Florida's) legislature. This would be all the more ill-advised in that the Tennessee position is the one followed by the majority of states, and for good reason. *See* Craig C. Conley, *Family Law – Randolph v. Randolph: Tennessee Requires Full Disclosure or Independent Knowledge for Antenuptial Agreements to be Valid*. 27 U. Memphis L. Rev. 1021, 1023-24 (1997). This law review article makes a telling point by drawing a sharp contrast between the law of Tennessee and Florida:

> Additionally, this approach is far superior to that taken by the Florida legislature and Florida courts, which does not allow nondisclosure to affect the validity of antenuptial agreements. The Florida approach opens the floodgates for inequitable agreements, fraud, and concealment. (footnotes omitted). . . . By imposing the foregoing requirements for valid antenuptial agreements, the Tennessee Supreme Court has attempted to

> afford fairness and protection in an area that can at times be devoid of such niceties.

Id. at 1038.

B. TENNESSEE HAS A STRONG PUBLIC POLICY THAT REQUIRES FULL AND FAIR DISCLOSURE OR INDEPENDENT KNOWLEDGE OF THE OTHER PROSPECTIVE SPOUSE'S FINANCES IN ORDER FOR AN ANTENUPTIAL AGREEMENT TO BE ENFORCEABLE.

Respondents/Appellants devote several pages of their Application for Permission to Appeal, pp. 12-19, to purported flaws in the analysis by which the Court of Appeals reached the conclusion that the public policy of Tennessee requires full and fair disclosure of financial information or independent knowledge. They argue that the Court of Appeals was required to engage in a two-part process to determine whether the public policy exception to the Full Faith and Credit Clause is relevant under the facts of this case. They further argue that all potentially pertinent public policies must be identified and weighed before a particular public policy of Tennessee can be invoked to bar application of another state's law.

Respondents/Appellants' arguments are simply wrong. At no time has this Court held that a two-part process must be followed. Rather, Respondents/Appellants have cobbled together their own two-part process out of bits and pieces of language in a series of opinions. More to the point, the Tennessee legislature, as well as the Tennessee Supreme Court, have spoken clearly and unequivocally as to this State's public policy vis-a-vis antenuptial agreements. In *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn.

1996), decided only a few years ago, this Court explicitly stated that: "It is now well settled in Tennessee that public policy allows the enforcement of antenuptial agreements *if certain prerequisites are satisfied.*" *Id.* at 819 (emphasis added). The Supreme Court then referenced Tennessee Code Annotated § 36-3-501, enacted in 1980, which provides that "if such agreement is determined in the discretion of the court to have been entered into by such spouses freely, knowledgeably and in good faith and without the exertion of duress or undue influence upon either spouse," it is enforceable.

The Tennessee Supreme Court in *Randolph* went on to hold that:

> As we interpret the knowledge element of the statute, the spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that full and fair disclosure of the nature, extent, and value of his or her holdings, was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent's holdings. Under the statute, disclosure or full knowledge *is required in all cases*, not just those which involve an agreement in which the provision for one spouse is wholly disproportionate to the means of the other spouse.

Id. at 821 (emphasis added).

The Court identified three policy considerations underlying the requirement of full and fair disclosure: First, an agreement to marry is different than other contracts. Specifically, the engaged parties are in a confidential

relationship and do not bargain at arm's length. Thus, they are fiduciaries who owe each other the utmost candor. Second, the parties are often very ill-matched in terms of bargaining power, and disclosure helps to correct any imbalance in bargaining power. As this Court explained, it "serves to level the bargaining field for the party in the weaker position." *Id.* Third, unlike other commercial contracts, the State has an interest in and is a party to every marriage. "Often, antenuptial agreements alter the rights parties otherwise would have. . . . Consequently, it is altogether appropriate that parties entering into antenuptial agreements do so with knowledge of the holdings to which they are waiving any claim under state law." *Id.*

The absolute requirement of full and fair disclosure enunciated in *Randolph* has been reaffirmed most recently in *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004). In *Bratton*, this Court held that postnuptial agreements are not violative of public policy, but only if they satisfy the same safeguards set forth in Tennessee Code Annotated § 36-3-501 with respect to an antenuptial agreement, including that the agreement is entered into "knowledgeably." *Id.* at 601.

* * *

2. The decision of the Court of Appeals is consistent with Tennessee decisions concerning common law marriages entered into in other states.

Respondents/Appellants also argue that, because Tennessee has recognized common law marriages entered into in other states that allow such marriages, Tennessee must now also recognize antenuptial agreements entered into in a state that does not require full and fair disclosure of financial information by prospective spouses. This

argument is based on a strikingly incomplete statement of the law. While the general rule is that a marriage valid where contracted is valid everywhere, there is an important exception to the general rule that has been consistently enforced: a marriage that violates local public policy shall not be recognized locally. *See Pennegar v. State*, 87 Tenn. 244, 248, 10 S.W. 305, 306 (1889).

If Tennessee courts are not permitted to deny recognition to any foreign "marriage," though repugnant to the strong public policy of this State, then the courts of this State will be required to recognize in the future novel "marriages" in other states including same-sex marriages, polygamous marriages, marriages of underage persons, and incestuous marriages. Tennessee has emphatically refused to recognize some of these types of out-of-state marriages in the past as violative of the State's public policy. *See* Tennessee Code Annotated § 36-3-113 (the only recognized marriage in the state is between one man and one woman; effect will not be given to marriages to the contrary solemnized in other states); Tenn. Op. Atty. Gen. No. 96-016 (Feb. 13, 1996) (Burson A.G.) (Full Faith and Credit Clause does not require recognition of validly contracted same-sex marriage in another state); Tenn. Op. Atty. Gen. No. 04-066 (April 19, 2004) (Summers, A.G.) (reaffirming Tenn. Op. Atty. Gen. No. 96-016 as correct statement of Tennessee public policy as well as interpretation of Full Faith and Credit Clause, and concluding that nonrecognition could extend to same-sex civil unions); *Rhodes v. McAfee*, 224 Tenn. 495, 497, 457 S.W.2d 522, 523, 534 (1970) (marriage to stepdaughter valid in Mississippi unenforceable in Tennessee as violative of Tennessee public policy against incest); *Pennegar v. State*, 87 Tenn. 244, 248, 10 S.W. 305, 306 (1889) (marriage to person with

whom spouse engaged in adultery, though allowed in Alabama, was not recognized in Tennessee, as violative of the settled public policy of this State). *See generally* W. Walton Garrett, TENNESSEE DIVORCE, ALIMONY & CHILD CUSTODY § 1:3 (rev. ed. 2004).

* * *